BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HOLLY HARRINGTON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,151
TETRA MANAGEMENT, INC.	)	
Respondent	)	
AND	)	
	)	
LIBERTY INSURANCE CORPORATION	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the June 15, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. W. Walter Craig of Derby, Kansas, appeared for claimant. Katie M. Black of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the May 15, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant alleges a neck injury as the result of a series of repetitive work-related traumas. In her Application for Hearing filed on August 11, 2011, claimant listed the date of accident as "on or about April 1, 2010 and each and everyday *[sic]* worked thereafter."[1] At the preliminary hearing, claimant alleged her date of accident was in May 2010, when she first received medical treatment, which was provided by respondent. Respondent contended claimant's date of accident was June 22, 2011, the date a physician first issued claimant restrictions. Respondent also denied that claimant sustained a personal injury by accident arising out of and in the course of her employment.

[1] Application for Hearing (filed Aug. 11, 2011).

ALJ Barnes found claimant's date of accident was in May 2010, and stated in her preliminary Order, "Rather, the Administrative Law Judge determines that the date of accident shall be based on all the evidence and circumstances and concludes that the date of accident occurred in May of 2010 when the Respondent and its Insurance Carrier accepted Claimant's injury as compensable and began providing authorized medical treatment."[2] Respondent raises the following issues:

1. Did the ALJ exceed her jurisdiction in determining the date of accident?

2. What is the correct date of accident? Does the pre-2011 Kansas Workers Compensation Act (Old Act) determine claimant's date of accident ? Or, does the Kansas Workers Compensation Act that took effect on May 15, 2011, (New Act) determine claimant's date of injury by repetitive trauma?

3. Did claimant sustain personal injury by accident or injury by repetitive trauma arising out of and in the course of her employment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

In early 2010, claimant, at work, began having tingling in her arms and fingertips as well as pain in her neck and shoulders. The symptoms began steadily worsening and claimant would have debilitating headaches at the end of each workday. Claimant went to see Dr. Chang, who recommended an MRI and physical therapy.

Claimant told several co-workers and her boss, Doug O'Connor, what Dr. Chang said. Mr. O'Connor commented that claimant's injuries sounded like they were work related and a workers compensation claim should be filed. Claimant thought Mr. O'Connor authorized physical therapy, as respondent's workers compensation insurance carrier paid for physical therapy through the summer of 2010. The physical therapy helped and in late summer and fall 2010, claimant's symptoms became manageable with Ibuprofen and other over-the-counter medications.

In the spring of 2011, claimant's symptoms again worsened and respondent's insurance carrier apparently referred her to Dr. John P. Estivo. Dr. Estivo's records indicate he first saw claimant on November 2, 2011. In addition to examining claimant, Dr. Estivo took an extensive history of her injury. He was told by claimant that she performed accounting duties and worked primarily at a computer, where she was seated the majority of the day. His records from that appointment indicated claimant began having

[2] ALJ Order (June 15, 2012) at 2.

headaches in February or March 2010. Claimant denied having symptoms before then. Dr. Estivo's records indicate claimant went to see her family physician at Wichita Clinic on April 28, 2010, but he was unavailable. Instead, claimant saw Dr. Peters, who prescribed muscle relaxants and anti-hypertension medications. Dr. Peters also ordered a CT scan, which revealed no abnormalities. On May 10, 2010, claimant also had an MRI, which revealed degenerative disc disease at C5-6 with a disc protrusion on the left, causing left foramina encroachment.

Dr. Estivo's November 2, 2011, report indicated that claimant saw Dr. Michael A. Chang on May 18, 2010. Dr. Chang ordered x-rays, which showed no abnormalities. Dr. Chang recommended epidural injections and physical therapy, but claimant opted only for the physical therapy. Claimant indicated that she continued to work and her symptoms steadily increased. According to Dr. Estivo's report, claimant reported her symptoms to her supervisor; a workers compensation claim was filed listing an injury date of May 18, 2011;[3] and claimant was sent to see Dr. Chang on June 22, 2011.

Dr. Estivo also reviewed an August 8, 2011, MRI ordered by Dr. Chang. Based on Dr. Estivo's examination of claimant and review of her prior records and prior MRIs, Dr. Estivo's impressions were that claimant had degenerative disc disease of the cervical spine, herniated discs at C5-6 and C6-7 and left arm paresthesias. Dr. Estivo indicated claimant's cervical degenerative disc disease was age related and not related to any specific event. He ordered a nerve conduction test and prescribed claimant physical therapy and pain and anti-inflammatory medications. With regard to causation of claimant's herniated discs and left arm paresthesias, Dr. Estivo stated,

> I think it is possible she may have developed herniated disks at C5-6 and C6-7 as she was sitting for long periods at the computer, requiring repetitive motion of her neck in completing her duties. Her job requires a lot of repetitive use of her upper extremities as well. She describes numbness and tingling into her left arm related to the repetitive use of her upper extremities in performing her accounting duties. I would relate her paresthesias of the left arm to her injury claim as well.[4]

Dr. Estivo gave claimant temporary restrictions of lifting no more than 20 pounds, no overhead lifting and to alternate her computer use of one hour on the computer and 15 minutes off. He also prescribed pain medication.

Dr. Estivo saw claimant again on November 9, 2011, after the nerve conduction test was completed. His impressions changed to herniated discs at C5-6 and C6-7, left carpal tunnel syndrome and left elbow ulnar nerve entrapment. He related the herniated discs, left carpal tunnel syndrome and left ulnar nerve entrapment to her work activities.

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[3] This appears to be an error as the injury date claimed was in 2010, not 2011.

[4] P.H. Trans., Cl. Ex. 1.

In a letter dated December 2, 2011, to a claims representative of respondent's insurance carrier, Dr. Estivo's opinion on causation changed dramatically. In the letter, he stated, "Considering the preexisting degenerative disk disease she has at C5-6 and C6-7 and the fact that there was no specific traumatic event, I think it is difficult at this point to specifically say that the herniated disks are caused by sitting at a computer."[5] Dr. Estivo then indicated claimant's cervical degenerative disc disease caused a disc protrusion resulting in a nerve root impingement that caused claimant's left arm symptoms.

In a letter to respondent's attorney dated April 30, 2012, Dr. Estivo stated, "The prevailing factor regarding this patient's symptoms is the cervical spine degenerative disk disease and not any specific incident or repetitive activity."[6] He also opined that claimant's employment did not expose her to increased risk or hazard of repetitive injury to which she would not otherwise have been exposed in normal non-employment life.

Claimant testified that in November 2011, she was informed her injuries were work related by Dr. Estivo. When claimant last saw Dr. Estivo in December 2011, he had changed his mind on causation. At that time Dr. Estivo explained to claimant that work activities were not the prevailing factor causing her injuries.

Claimant testified that when she saw Dr. Estivo in November or December 2011, he mentioned something about lifting no more than 10 or 20 pounds, but did not recall if Dr. Estivo gave restrictions. Nor did claimant receive anything in writing from Dr. Estivo. At the preliminary hearing, claimant testified she had never been taken off work because of her injuries and continued to work for respondent. Claimant was not asked and did not testify that respondent modified her job duties.

Although it would have been helpful to the fact finder to have all of Dr. Chang's records placed into evidence, only Dr. Chang's notes from his June 22, 2011, visit with claimant were made an exhibit. In those notes, he recommended temporary restrictions for claimant of avoiding bending, turning, twisting and lifting, pushing and pulling no more than 10 or 15 pounds.[7] He ordered another MRI, and would not recommend a course of treatment until after he reviewed the MRI results. Dr. Chang indicated he had seen claimant a year earlier and her symptoms had worsened. Claimant implied that she was not made aware of these restrictions, when she testified the first time she was restricted by a doctor was when Dr. Estivo provided restrictions in December 2011.

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[5] *Id.*

[6] *Id.*, Resp. Ex. 1.

[7] There is nothing in the record to indicate whether claimant's work duties were modified by respondent after claimant's June 22, 2011, appointment with Dr. Chang.

On March 27, 2012, at the request of her counsel, claimant was evaluated by Dr. David W. Hufford, an occupational and sports medicine specialist. He indicated claimant initially reported her symptoms in May 2010, and the symptoms continued thereafter in a linear fashion. His report stated,

> By her chronology and her subjective history given to Dr. Chang at the June 22, 2011 visit, her increasing symptomatology began before May 15, 2011. Therefore, her current symptomatology which continues in a linear fashion to the present time was present prior to the new Kansas Worker's Compensation law and represents a continued aggravation of her underlying cervical degenerative disc disease. This is the primary cause for her current symptomatology and issues regarding reporting dates and prevailing factor are administrative issues unrelated to the medical issues which are examined here.[8]

PRINCIPLES OF LAW

Prior to May 15, 2011, the Workers Compensation Act placed the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[10]

Commencing May 15, 2011, the Workers Compensation Act continues to place the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[11] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[12]

In its application for review and brief to the Board, respondent asserts the ALJ exceeded her jurisdiction by determining claimant's date of accident. However, respondent provides no authority for this assertion. At a preliminary hearing, ALJ Barnes has authority pursuant to K.S.A. 44-534a to determine whether claimant's injuries are compensable. In order to fulfill that obligation the ALJ must determine claimant's date of accident. If an ALJ did not have authority to determine an injured worker's date of accident, the ALJ could not

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[8] P.H. Trans., Cl. Ex. 2 at 2.

[9] K.S.A. 2009 Supp. 44-501(a).

[10] K.S.A. 2009 Supp. 44-508(g).

[11] K.S.A. 2011 Supp. 44-501b(c).

[12] K.S.A. 2011 Supp. 44-508(h).

resolve issues of timely notice, timely written claim, or which version of the Kansas Workers Compensation Act applied to the accident. Simply put, ALJ Barnes had the authority to determine claimant's date of accident.

K.S.A. 2009 Supp. 44-508(d) (Old Act) states:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2011 Supp. 44-508(e) (New Act) states:

> "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
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> In no case shall the date of accident be later than the last date worked.

The ALJ found claimant's date of accident was in May 2010. She appears to have relied on that part of K.S.A. 2009 Supp. 44-508(d) that states, "In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances." K.S.A. 2009 Supp. 44-508(d) provides that the earliest date of accident is the date an authorized physician takes the employee off work due to the condition or restricts the worker from performing the work which is the cause of the condition. Dr. Chang gave claimant work restrictions on June 22, 2011, which meets one of the criteria to determine date of accident as set out in K.S.A. 2009 Supp. 44-508(d). Therefore, this Board Member finds claimant's date of accident is after May 15, 2011.

Claimant has alleged a repetitive injury. Under the New Act if an injured worker sustains a repetitive injury, the term "date of accident" has been supplanted by the term "date of injury by repetitive trauma." If one applies the New Act, K.S.A. 2011 Supp. 44-508(e), claimant's date of injury by repetitive trauma is the earliest of four triggering events. The earliest event that applies to this claim is contained in K.S.A. 2011 Supp. 44-508(e)(2). That factual occurrence is the date the employee is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma.

It is significant that since claimant first became aware of her symptoms in February or March 2010, she has continued working for respondent. There is little, if any, evidence indicating respondent modified claimant's job tasks, or that claimant self-limited her work activities. This was true even after Dr. Chang on June 22, 2011, imposed restrictions on claimant. Following physical therapy in 2010, claimant's symptoms improved, although she never became asymptomatic. Dr. Hufford indicated that after May 2010, claimant's symptoms continued on a linear basis. The medical records in evidence document that most of claimant's medical treatment occurred after May 15, 2011. This Board Member finds that if one applies K.S.A. 2011 Supp. 44-508(e), then claimant's date of injury by repetitive trauma is after May 15, 2011.

The last issue raised by respondent is that claimant failed to prove she sustained a personal injury by accident arising out of and in the course of her employment with respondent. Respondent first contends claimant's work activities did not expose her to an increased hazard that she would not be exposed to in her normal non-employment life. Although little testimony was elicited from claimant about her job duties by either attorney, Dr. Estivo's records described claimant's job duties. The frequency and extended periods of time that claimant used a computer did expose claimant to an increased hazard. This

Board Member finds that working on a computer for the majority of the workday, while seated, is not a normal activity of day-to-day living.

Respondent alternately argues that if claimant's date of accident is after May 15, 2011, the 2011 amendments to the Act require that claimant's work activities be the prevailing factor causing her current need for medical treatment. It then relies on the opinion of Dr. Estivo that claimant's work activities were not the prevailing factor in causing her current need for medical treatment. The credibility of Dr. Estivo is questionable on the issue of whether claimant's injuries are work related. After he was contacted by a case manager for respondent's insurance carrier and respondent's attorney, Dr. Estivo abruptly changed his opinion on the cause of claimant's herniated discs and left arm injuries. He also indicated claimant's work activities were not the prevailing factor causing claimant's cervical degenerative disc disease and left arm paresthesias.

Conversely, Dr. Hufford opined claimant's work activities were the primary cause causing her symptomatology. His report states that issues regarding reporting dates and prevailing factor are administrative issues that are unrelated to the medical issues. This Board Member adopts Dr. Hufford's opinion and the initial opinion of Dr. Estivo that claimant's injuries are work related. Claimant's work activities were the prevailing factor causing her current need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[14]

CONCLUSION

1. The ALJ had authority to determine claimant's date of accident.

2. Claimant's date of accident is after May 15, 2011.

3. Claimant sustained personal injuries by repetitive trauma arising out of and in the course of her employment with respondent.

WHEREFORE, the undersigned Board Member modifies the June 15, 2012, Order entered by ALJ Barnes by finding claimant's date of injury by repetitive trauma was after May 15, 2011. ALJ Barnes' Order is affirmed in all other respects.

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[13] K.S.A. 2011 Supp. 44-534a.

[14] K.S.A. 2011 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of October, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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